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ARBITRATION'S DISCONTENTS: BETWEEN THE PERNICIOUS AND THE PRECARIOUS

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William W. Park
Boston University School of Law

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Arbitration's Discontents:
Between the Pernicious and the Precarious
William W. Park*

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* Professor of Law, Boston University. President, London Court of International Arbitration. General Editor, Arbitration International. Copyright © 2014 William W. Park

I. Introduction

A. Widening Scope of Arbitration

Not surprisingly, arbitration has become a victim of its own success, as its wider use has triggered a flood of doubt, disapproval and denunciation. In consequence, higher visibility for arbitral proceedings and awards has led to increased criticism, both just and unjust.

As an initial matter, one should pause just to marvel at the extraordinary range and number of disputes, both domestic and international, now sent to binding private adjudication. Much of this activity falls well beyond what was contemplated when modern arbitration statutes and treaties were adopted in the early and middle part of the 20th century.

In the trans-border arena, arbitration's traditional stomping grounds included shipping, insurance, some oil and gas, as well as sales and joint ventures. Now, arbitration has been pressed into routine service far beyond these customary frontiers, to address big-ticket patent-license disputes arising under license agreements, breaches of international law arbitrated pursuant to investment treaties and free trade agreements, disputes related to Olympic events,¹ and income tax disputes implicating intra-group transfer pricing.²

For domestic transactions, the increased use of arbitration has proved no less dramatic. During much of 2013, France was gripped by allegations of rigged arbitration resulting in a €403 million award in favor of French businessman Bernard Tapie.³ The arbitration arose from claims against the bank Crédit Lyonnais in connection with its role in selling the businessman's interest in the sporting goods company Adidas,⁴ and implicated a former judge who, in his role as arbitrator, is accused of having written the award without disclosing ties to the businessman's lawyer.⁵

¹ Antonio Rigozzi, *L'arbitrage international en matière de sport* (Bâle, Helbing & Lichtenhahn 2005); *Arbitration at the Olympics* (Kluwer 2001).

² William W. Park & David R. Tillinghast, *INCOME TAX TREATY ARBITRATION* (2004); William W. Park, *Arbitrability and Tax*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 179 (L. Mistelis & S. Brekoulakis, eds., 2008); Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23 *ARB. INT'L* 405 (2007).

³ On the controversy over the award of 7 July 2008, see generally Gérard Davet et Fabrice Lhomme, *Affaire Tapie : comment l'arbitrage a été verrouillé*, *Le Monde*, 17 June 2013; Gérard Davet et Fabrice Lhomme, *Affaire Tapie: les deux lettres qui révèlent l'escroquerie*, *Le Monde*, 29 July 2013. Following accusations of tribunal corruption, the matter reached proportions that led to arrest and policy custody for several individuals involved in the arbitration.

⁴ The initial dispute arose when Tapie suffered a substantial loss on his sale of Adidas, arranged through Crédit Lyonnais after the bank converted some of its Adidas debt into equity and then sold the company for a much higher amount than the original debt.

⁵ The matter was referred to arbitration following long-running litigation. The losing party was a state agency (Le Consortium de Réalisation) as successor to Crédit Lyonnais following a

Perhaps the greatest extension has been in the United States. Studies of arbitration during the early part of the last century addressed a phenomenon related to transactions among merchants,⁶ or in connection with construction (as a way to find expertise)⁷ and labor law (as an outgrowth of collective bargaining agreements reflecting trade union distrust of judges).⁸

Today, however, American arbitration has pushed to address consumer disputes, employment contracts, and franchise agreements, all quite beyond the merchant-to-merchant controversies

government bail-out. During her tenure as French finance minister in the Sarkozy government, Christine Lagarde (now IMF Managing Director) had been instrumental in having the dispute referred to arbitration. The award in favor of Tapie was made by a three-member tribunal that included Pierre Estoup (formerly Versailles Cour d'appel), alleged to have had improper undisclosed connections with Tapie's lawyer, Maurice Lantourne. The two other members of the tribunal were Jean-Denis Bredin (well-known French attorney) and Pierre Mazeaud (former president of the French Conseil Constitutionnel).

⁶ Daniel Bloomfield, *Selected Articles on Commercial Arbitration* (H.W. Wilson Col., 1927). See also, Wesley A. Sturges, *Treatise on Commercial Arbitrations and Awards* (Vernon Law Book Co., 1930). Professor Sturges, later Dean of Yale Law School, also edited a collection of cases on arbitration.

⁷ See e.g., Laurence P. Simpson & Essel R. Dillavou, *Law for Engineers and Architects* (1929; 2d ed. 1937), chapter 4(6), at 129-132, putting forth the proposition that "an arbitration clause in a building contract is in general illegal and void as depriving the courts of jurisdiction, where it is so broad as to cover the general question of liability." *Id.* at 129. The learned treatise continues that an agreement to arbitrate may be enforced if "limited to disputed questions of fact" citing *J.T. Williams & Bro. v. Branning Mfg. Co.*, 154 N. C. 206, 70 S.E. 2909 (1911), which makes a distinction between pre-dispute agreements to arbitrate and "submission consummated by an award" the latter perhaps making reference to a post-dispute submission. The treatise drops a footnote to the Federal Arbitration Act and thirteen (13) states which by statute may have modified the common law rule. See also *Audel's Carpenter's and Builder's Guide* (Ed. Frank D. Graham & Thomas J. Emery (Audel & Co. New York, 1923) at 748-762, including an arbitration clause as Article 45 in the General Conditions of Contract (Standard Form of the American Institute of Architects).

⁸ Concern about judicial hostility to trade unions led to arbitration of collective bargaining agreements in the United States, albeit on a statutory foundation separate from that of the Federal Arbitration Act. See *Taft-Hartley Labor-Management Relations Act*, § 301, 29 U.S.C. § 185 (2003). This once led left-leaning judges in the United States to wax eloquent about the benefits of arbitration in the context of labor disputes. See opinions by Justice Douglas in *Textile Workers Union of America v. Lincoln Mills* 353 US 448 (1957) and the so-called 'Steelworkers Trilogy', which included *United Steelworkers of America v. American Mfg. Co.* 363 US 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.* 363 US 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363 US 593 (1960).

contemplated back in 1925 when the Federal Arbitration Act was adopted.⁹

Arbitration has also become the mean of choice in addressing charges of sports doping, as witnessed by cycling scandals involving Floyd Landis and Lance Armstrong, and now American baseball players, most recently highlighted by the 200 game suspension of New York Yankees third baseman Alex Rodriguez.¹⁰

Even beauty pageants now look to arbitration for dispute resolution, in the type of case whose profiles and contours cannot help but raise questions about the arbitral process. In last year's Miss Universe contest, the young woman crowned as Miss Pennsylvania failed to make it to the finals, ultimately losing to Miss Rhode Island.¹¹ When the disappointed contestant went public with charges that the pageant was rigged, in disregard to the contestants' true charm and talent, the bad press coverage meant a loss of considerable advertising revenues. A claim was filed for defamation, with an arbitrator directing the unfortunate Miss Pennsylvania to pay \$5 million to Donald Trump and the other pageant sponsors. A federal court confirmed the award notwithstanding the contestant's lawyer having failed to appear at the hearings.

Of course, inept lawyers are not a novelty. And beauty queens can lose in court as well as in arbitration. However, the publicity of such a case inevitably fuels debate, providing occasion for analytic distortion and trivialization of what is at stake.

B. The Nature of the Criticism

Some of the criticism leveled at arbitration must be seen as motivated by the desire to discredit private adjudication for reasons of professional gain or political predisposition. The so-called

⁹ Ian R. Macneil, *American Arbitration Law* (1992).

¹⁰ On 5 August 2013 Major League baseball announced the 211 game suspension of New York Yankees player Alex Rodriguez for use of steroids and failing to cooperate with an investigation into performance enhancing drugs. The Uniform Player's Contract that must be signed by every player to join a major league team contains a grievance procedure. See Article XI of the Basic Agreement between the team owners and the MLBPA (players association), now in its 2012-16 iteration. The grievance procedure includes an agreement to arbitrate pursuant to "Rules of Procedure" binding on Rodriguez when he signed his contract with the Yankees.

¹¹ The original accusation of contest corruption had been based on back-stage information said to have been shared by Miss Florida during a June 2012 telecast in Las Vegas. *Miss Universe v. Monnin*, 2013 WL 3328241 (SDNY, 2 July 2013). The contestant and her lawyer had received notice of the arbitration, but advised his client to ignore the proceedings. The reviewing judge was not unsympathetic to the devastating consequences of the poor choice of counsel, yet nevertheless confirmed that sympathy must "play no role in a court's legal analysis" at least where the law was clear.

plaintiffs' bar in the United States would generally rather be before civil juries, thought to be more malleable than arbitrators, thus more prone to high verdicts. The debate over "class action" has given new vigor to the ideological divide.

In this connection, a recently published book with the provocative title *Outsourcing Justice*¹² carries a dedication page, "For the Millions of Americans Who Are Unjustly Bound by an Arbitration Agreement." Although it does contain some points of historical interest, discussion has been peppered with sensational outliers, like stories about arbitration of rape in Baghdad.¹³

Much of the ideologically motivated critique paints with a brush that often denigrates arbitration *per se*, calling into question the fundamental fairness of all contract and treaty provisions waiving recourse to otherwise competent courts in favor of binding private adjudication.¹⁴ Particularly in the context of international transactions, such overly broad attacks (like the overly broad defenses of arbitration) forget that the chief reason for private dispute resolution in an international context, whether commercial or investor-state: creation of a relatively level playing field. The keyword is "relative" of course, as no playing field will be completely level. However, some are rougher than others. Which is why one must contemplate alternatives.¹⁵

Not all criticism has been leveled by poseurs and ideologues, however. Some critics of the system remain sincerely concerned about the best way to resolve disputes. Many thoughtful observers express concern about particular abuses. These may relate to arbitral procedure itself, such as practices perceived as causing undue cost and delay. Or, frustration may be directed toward the judicial actions forming the warp and woof of arbitration's legal framework, which

¹² Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (Carolina Academic Press 2013)

¹³ The book begins with four pages of description of a brutal assault that led to *Jones v. Halburton*, 583 F.3d 228 (5th Cir. 2009), *aff'd* 9625 F. Supp. 2d 339 (S.D. Tex. 2008), *cert den'd* *Technical Services Inc. v. Jones*, 130 S.Ct. 1756 (2010). The court held that claims related to assault and battery, which were independent of the employment relationship, need not be submitted to arbitration. Without any recognition of the cognitive dissonance, the book slips a line about the plaintiff having found the criminal justice system "unresponsive" (*Outsourcing Justice* at 5).

¹⁴ See e.g., Andrew Martin, *Treaty Disputes Roiled by Bias Charges*, Bloomberg.com News, 10 July 2013. Spilling considerable ink on criticism of investor-state arbitration, the article generally ignores the many constructive suggestions for improving the system made by members of the international business community themselves. Instead, the article simply selects one generalized reaction -- "defamatory and idiotic" -- by a former Judge of the International Court of Justice who had been criticized in an arbitral proceeding.

¹⁵ For a recent scholarly treatment of abuse in commercial arbitration, see Dr. Daniel de Andrade Levy, *Les abus de l'arbitrage commercial international*, Thèse Soutenue 20 mars 2013, Direction de Christian Larroumet, Paris II Panthéon-Assas.

on occasion appear to have been hijacked for perverted ends, notably to derail efficient dispute resolution or to upset a fair award.¹⁶

C. Where the Real Problems Lie

So what is to be done? If one looks past the ideological shrubbery of righteous indignation and rhetorical flourish, two undeniable difficulties lurk in the shadows of almost all varieties of binding private adjudication pursuant to pre-dispute arbitration agreements.

The first “action item” for those sincerely concerned about the future of private dispute resolution relates to arbitration’s legal framework: the aggregate treaties, statutes, and cases which provide a foundation for the legitimacy of arbitration, justifying the binding character of any award if challenged before national courts. In broad terms, the role of modern arbitration law includes holding parties to their bargain to waive recourse to otherwise competent courts (which means recognizing arbitration agreements and awards) and a correlative goal that implicates judicial monitoring of the basic integrity of the arbitral process. This latter function aims to increase the prospect that the litigants will have their case heard by a relatively unbiased tribunal which accords a right to be heard before making its decision, sticks within the mission conferred on the arbitrators, and respects the limits imposed by public policy. In other words, the role of law is to enhance the rule of law in the sense of basic due process.

Parallel with concern for arbitration’s legal framework, one should look to arbitrator ethics, in its broadest sense: questions of independence, impartiality, and prejudgment, whether on the level of individual cases or systematic bias built into a set of rules or institutional supervision. “Ethics” of course serves as fancy shorthand for the unofficial constellation of norms related to right conduct, derived from ideas of propriety within a profession or community that may not necessarily be articulated in any treaty, statute or court decision, but form part of what is sometimes called the “soft law” of arbitration.

It is to this body of ethical considerations we now turn.

II. Two Ways to Sabotage Arbitration

Imagine that an evil gremlin sought to bring arbitration into disrepute. Two starkly different routes might commend themselves. One route would tolerate appointment of pernicious arbitrators, biased and unable to judge independently. An alternate route to shipwreck, also reducing confidence in the integrity of the arbitral process, would establish unrealistic ethical standards that render the arbitrator’s position precarious and susceptible to destabilization by litigants engaged in dilatory tactics or seeking to annul unfavorable awards.

To reduce the risk of having cases decided by either pernicious or precarious arbitrators, those

¹⁶ Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010).

who establish and apply ethical guidelines walk a tightrope between the rival poles of (i) keeping arbitrators free from taint, and (ii) avoiding manoeuvres that interrupt proceedings unduly. From the command post of bland generalities, the job of evaluating independence or impartiality may seem simple. In light of specific challenges, however, the task becomes one of nuance and complexity, often implicating subtle wrinkles to the comportment of otherwise honorable and experienced individuals.

The quest for balance in ethical standards entails a spectrum of situations in which mere perceptions of bias may be given weight equal to real bias. To promote the litigants' trust in the arbitral process, an arbitrator might sometimes step down just to alleviate one side's discomfort. Not always, however. In some instances it would be wrong to permit proceedings to be disrupted by unreasonable fears, whether real or feigned.

If arbitrators must be completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent would be available. Consequently, notions such as "proximity" and "intensity" will be invoked to evaluate allegedly disqualifying links or prejudgment. As we shall see, the search for balance in ethical standards compels a constant re-evaluation of the type of relationships and predispositions likely to trouble international arbitration.

III. Problematic Relationships and Attitudes

A. Independence and Impartiality

Arbitrator conflicts of interest usually fall into one of two categories: lack of independence and lack of impartiality. In common usage, independence refers to the absence of improper connections, while impartiality addresses matters related to prejudgment. The common assumption is that an arbitrator in international disputes must be *both* impartial and independent. Thus individuals should decline appointment if they have doubts about their ability to be impartial or independent, or if facts exist such as to raise reasonable concerns on either score.

Lack of independence derives from what might be called problematic relationships between the arbitrator and one party or its lawyer. Often these result from financial dealings (such as business transactions and investments), ties of a sentimental quality (including friendships and family), or links of group identification (for example, shared nationality and professional or social affiliations).

Even if no special relationship or financial link exists with either side, a second category of concerns will arise if an arbitrator appears to have prejudged some matter. An arbitrator might be independent but still be a bigot, with low opinions about people of a particular race, nationality or religion. This second category (often called "actual bias") was illustrated by the English decision arising from a maritime accident off the coast of France, between a Portuguese and a Norwegian vessel, submitted to arbitration in London by the two respective

ship-owners.¹⁷ During hearings, counsel for one side mentioned a case involving Italians. To which, the arbitrator responded as follows:

Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the [the Norwegian vessel].

In connection with the application to remove the offending arbitrator, it was argued that a formal award not having yet been rendered, there was no evidence that an ultimate decision against the Portuguese would in fact rest on the biased perspective. Rejecting what might be called an argument too clever by half, the court confirmed that justice must not only be done, but must be seen to be done. The arbitrator was removed.

More subtle examples of prejudgment might include a procedural order that presumes contested facts on which evidence has not been heard. In other instances, an arbitrator might have written an article or delivered a speech taking a firm position on otherwise open questions that remain central and controversial in the dispute.

No magic attaches to this conceptual framework. Independence and impartiality serve merely as intellectual hooks on which to hang analysis with respect to two basic principles expected of arbitrators. No arbitrator should have links with either side that provide an economic or emotional stake in the outcome of the case. And no arbitrator should decide a controverted matter prior to hearing evidence and argument.

A third notion, sometimes called “neutrality,” generally encompasses both independence and impartiality. This term takes on a special connotation for domestic arbitration within the United States, which traditionally distinguished between “neutral” and “non-neutral” arbitrators.¹⁸

One useful formulation of the type of the independence required of arbitrators might be found in the notion of “relative reversibility” as between the two sides. Under this approach, an arbitrator would be independent as between an Israeli seller and an Egyptian buyer if his predisposition toward one side or the other would not change on reversal of the parties’ nationalities. In that particular context, a French or Swiss arbitrator might be characterized as more neutral than an Israeli or an Egyptian. This does not mean that an Israeli or an Egyptian arbitrator would lack

¹⁷ In re The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norma [1938] 61 Lloyd’s Rep. 360 (Eng.).

¹⁸ See Code of Ethics for Arbitrators in Commercial Disputes (2004), note on neutrality, available at www.abanet.org/dispute/commercial_disputes.pdf (“AAA/ABA Code of Ethics”). The 2004 version establishes a presumption of neutrality unless the parties agree otherwise, in which event the non-neutral individuals will be governed by the tenth set of principles in the Code of Ethics. *Ibid.* Canon X.

integrity. Rather, a perception might exist that it would be asking too much of either one to judge the dispute.

Of course, an arbitrator may deviate from duty through avenues other than prejudgment and inappropriate relationships. The contours of integrity touch on matters as diverse as delegation of tasks, participation in settlement negotiations, and inappropriate interviews with party representatives. Nevertheless, independence and impartiality constitute the core of arbitrator integrity, and continue to be emphasized at professional symposia and in the literature.

B. Can Integrity Be Waived?

One intriguing question relates to the extent that either independence or impartiality may be waived by fully informed litigants. In some circles the answer seems to be a conditional “yes”, at least with respect to independence, even if not necessarily so for impartiality. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) contain a “Red List” of prohibited relationships that bifurcates into waivable and non-waivable relationships. The former include, *inter alia*, an arbitrator who acts for a litigant in the case, or is a member of the same firm as counsel to one side. The latter encompass an arbitrator’s service as director in a corporation that is party to the case or as adviser to his or her appointing party.¹⁹

Independence thus seems to lend itself to waiver up to the point where the litigant actually becomes judge of its own cause. At that moment the decision-making process may no longer bear the attributes permitting its enforcement as an “award” under relevant statutes and treaties. Although a mother might well referee games among her children, deciding a quarrel between her son and his schoolmate would be a different matter. Likewise, it would be impermissible for an arbitrator to own a majority interest in one of the parties, no matter how much he or she might try to be fair.

A recent case tested the extent to which arbitrator integrity can be waived in an international context.²⁰ A dispute arose over distribution of a Biblical citrus fruit called the *esrog* (or *etrog*), used in connection with the Jewish Harvest festival of Succoth. An American distributor refused to pay the balance due for imported fruit, complaining that the Israeli grower had circumvented the exclusive distributorship by selling to third parties. The controversy was submitted to arbitration before an Israeli clergyman who found in favor of the grower. The award was presented for enforcement in the United States under the New York Convention.²¹ The distributor resisted confirmation, arguing that the arbitrator was not

¹⁹ International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2004 (“IBA Guidelines”).

²⁰ *Schwartzman v. Harlap*, 2009 WL 1009856 (E.D.N.Y. April 13, 2009).

²¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 21 UST 2517, 330 UNTS 38 (“New York Convention”). This convention is also called the 1958 United Nations Arbitration Convention.

independent, due to services rendered to the grower by certifying the orchard's kosher status, which was essential to maintaining the fruit's marketability.

The court rejected the challenge, finding that the distributor knew of the arrangement and thus waived a right to complain. The assumption seems to have been that the right to a fair hearing could be waived, or at the least that objections must be raised in a timely fashion. From a practical perspective this seems reasonable. Otherwise, a litigant might simply hope for a successful outcome, raising the conflict only if things do not end with a happy result.

How far this result can be pushed remains open to question. The case concerned lack of independence, not positive prejudgment. Although interrelated, independence and impartiality are not the same thing. Prejudgment would seem to impede the very heart of the arbitral process, which presumes a quasi-judicial function of deciding legal claims after weighing evidence and argument. The lack of independence may create an imperfect arbitration, but prejudgment renders the process a sham formality, an unnecessary social cost. Although the New York Convention contains no definition of *arbitration*, prejudgment seems entirely foreign to the process whose recognition the treaty contemplates.

Nothing prevents enforcement of an arbitrator's decision simply as a matter of contract. However, actors in cross-border commerce seek something more than just a contractual framework for arbitration. The New York Convention and its antecedents (the Geneva Convention and Geneva Protocol of 1927 and 1923, respectively) grew from dissatisfaction with contract law alone as a remedy for failure to respect arbitration commitments. The commercial community sought to facilitate enforcement of arbitrators' decisions as *awards*, not simple contracts.

The legal matrix for such enforcement presumes a minimum level of impartiality in the arbitrator's respect for the parties' right to be heard or "de faire valoir ses moyens."²² Likewise, for investor-state arbitration the ICSID Convention requires arbitrators to be persons "who may be relied upon to exercise independent judgment" and permits challenge of an award for "departure from a fundamental rule of procedure."²³ Although litigants might waive impartiality as a matter of contract, in so doing they may well remove their dispute from the legal framework applicable to the creature we call arbitration.

Not all agree, however, with such a balance between freedom of contract and arbitral integrity. One of the most thoughtful scholarly commentators argues that ethical questions should resolve

²² New York Convention, Art. V(1)(b) provides for non-recognition when the losing party was "unable to present his case." The French text talks about the impossibility of a party "de faire valoir ses moyens." Likewise, the Federal Arbitration Act permits vacatur in the event of "evident partiality" by the arbitrator. 9 USC s. 10(a)(2) (2006).

²³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arts. 14(1), 52(1)(d), 18 March 1965, 17 UST 1270, 575 UNTS 159 ("ICSID Convention").

themselves into issues of contract interpretation.²⁴ Even if this perspective might prevail in certain jurisdictions, it does not necessarily commend itself as the better view as a policy matter. One remembers words attributed to Talleyrand to the effect that the excessive becomes meaningless: “Tout ce qui est excessif devient insignifiant.”

C. The Devil in the Detail

Most analysis starts with relatively clear models on which most reasonable people agree, and then proceeds from black and white to shades of gray. An arbitrator who says French people exaggerate should not judge a case with a respondent from Paris. And an arbitrator should not become romantically entangled with a lawyer representing one side in the case.²⁵ Equally settled is the proposition that an arbitrator will not be disqualified merely because once, during a mid-morning coffee break at a professional lecture, he chatted with a lawyer appearing before him in a case.

Nuances appear at some point between extremes. The somewhat ambiguous notion of friendship might encompass business associates who occasionally share a meal, as well as confidants who exchange regular calls and visits. In some cases, the shared cup of coffee can become a deeper relationship that results in arbitrator disqualification.²⁶

Although some behavior patterns provide per se evidence of impropriety, other types of conduct take on radically different ethical overtones depending on the circumstances. For example, arbitrators concerned about committing time for distant hearings might build into their terms of appointment provisions to cover days reserved but ultimately not used due to the parties' decision to cancel without adequate notice. In some instances, a retainer might be requested to cover such an eventuality. If properly disclosed to all parties and requested prior to accepting the time commitment, such an arrangement might not pose any problem.²⁷ However, a retainer paid

²⁴ Alan Scott Rau, *On Integrity in Private Judging*, 14 ARB. INT'L 115 (1998), adapted from Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485 (1997). See also Ahmad Baravati v. Josephthal, Lyon & Ross, Inc. and Peter Sheib, 28 F.3d 704, 709 (7th Cir. 1994), in which Judge Posner suggests that “short of authorizing trial by battle or ordeal, or more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes”.

²⁵ For a tale of room sharing by an arbitrator and a lawyer appearing before him in a case, see Richard B. Schmitt, “Suite Sharing” in *Wall Street Journal*, 14 February 1990, p. A1.

²⁶ For a recent survey of the specific details of challenges to arbitrators based on allegedly inappropriate comportment, see Special Issue on Arbitrator Challenge, LCIA Arbitrator Challenge Digests, with Introduction by Thomas W. Walsh & Ruth Teitelbaum, 27 ARB. INT'L 283 et seq. (2011)

²⁷ See e.g., *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.* [1991] 1 Lloyd's Rep. 524 (CA) (Eng.) (holding the arbitrators did not misconduct themselves in seeking security for remuneration with respect to 12 weeks of hearings scheduled for two years in the future).

by only one party, and not revealed to the other side, might well be seen as a bribe, and understandably so.²⁸

More subtle factors can also color perceptions and evaluations on conflicts of interest. Was a gap in the *curriculum vitae* intentional or inadvertent?²⁹ Was the arbitrator's previous consulting work for one of the parties significant?³⁰ Does a former law firm affiliation create a perception of continuing links? The appreciation of a conflict might vary depending on whether it is expressed in a positive or a negative fashion. Is an "independent" arbitrator the same as one who is "not biased" toward either side?

Often it will be important whether a lawyer serving as an arbitrator practices in partnership with a firm whose other members represent affiliates of the litigants. On occasion, however, an arbitrator may be tainted even without the status of employee or partner. One Paris Court of Appeal judgment addressed a situation in which a lawyer with the Paris office of a large multinational law firm had failed, apparently by simple inadvertence, to disclose all links between his firm and one of the parties.³¹ Although neither a partner nor associate (but simply "of counsel") to the law firm, the lawyer was found to be constitutionally connected (*structurellement lié*) with the Paris office to an extent requiring attribution of the firm's conflicts.

A general standard of independence usually takes meaning only as applied to specific cases, some of which resist facile analysis. Should an arbitrator be disqualified if he or she sits on the board of a financial institution that manages pension funds holding shares of affiliates of one of the parties? If so, does it matter how large the institution, or how sizeable the ownership of interest might be in proportion to the entire portfolio?

If it seems obvious that an arbitrator should not sit when he or she represents one of the parties, does the same rule apply when his firm represented an affiliate in an unconnected matter five

²⁸ See e.g., Lawrence F. Ebb, *A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements*, 3 AM. REV. INT'L ARB. 177, 181–90 (1992) (discussing *State of Israel v. Desert Exploration*), as reprinted in W. Michael Reisman, W. Laurence Craig, William W. Park and Jan Paulsson, *International Commercial Arbitration* (1997), p. 603.

²⁹ See *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 137 (CA) (Eng.), available at 2000 WL 571190.

³⁰ See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968). Compare the competing approaches of Justices Black (requiring disclosure of any relationship), White (calling for scrutiny only of non-trivial links) and Fortas (focusing on actual bias).

³¹ See *La SA JandP Avax SA v. Société Tecnimont SPA*, Cour d'appel Paris, 1e ch., sec. C, 12 February 2009, (2009) *Rev. Arb.* 186, note Clay. The award was vacated under art. 1502(2) of the French Code de procédure civile, providing for annulment when an arbitral tribunal was not properly constituted (*tribunal irrégulièrement composé*).

years ago? What about one year ago? Or ten? If it seems obvious that an arbitrator should not be having a romance with a lawyer for one of the parties, the same conclusion will not necessarily be self-evident with respect to a witness with whom a good friendship existed during university days. In determining when a professional acquaintance becomes a disqualifying relationship, the devil will be very much in the detail of how regularly the two might dine together.

Should national origin matter? Should it matter that an arbitrator is an American of Korean ancestry presiding in a dispute between a Korean claimant and a Japanese respondent?³² And what about religion? In a domestic commercial arbitration, one would not normally expect an arbitrator being challenged for being Muslim or Hindu.³³ Would the same calm insouciance toward religious affiliation obtain with respect to arbitration of a border dispute between Pakistan and India?

Likewise, the very existence of professional expertise can present an ethical conundrum. If a scholar has expressed a firm opinion on a narrow and controverted point on which the case hangs, she may not inspire confidence in the party that received the rough side of the academic analysis. However, learned professionals do (and should) write treatises sharing their knowledge. A professor of contract law at a US law school would not normally be disqualified for having written about “offer and acceptance.” It would be a shame to exclude from service those who really know something, leaving arbitration only to the ignorant.

D. The Parties’ Role in Arbitrator Selection

³² See generally, Ilhyung Lee, *Practice and Predicament: the Nationality of the International Arbitrator*, 31 FORDHAM INT’L L.J. 603 (2008).

³³ The obverse might be less certain, however. The High Court of London has sustained a challenge to an arbitrator because he was not Muslim. An arbitration clause in a joint venture between two Muslim businessmen provided for a tribunal drawn exclusively from the Ismaili community, a branch of Shi’a Islam led by Aga Khan. One side resisted the other’s attempt to appoint a retired English judge who was not Ismaili. The party seeking to confirm the appointment argued that to bar non-Muslims would constitute religious discrimination in violation of English law. The court rejected that argument and upheld the constitution of an all-Ismaili tribunal. See *Nuridin Jivraj v. Sadruddin Hashwani* [2009] EWHC (Comm) 1364 (Eng.). This result accords with the way many courts treat proceedings before a *Beth Din* (court of Jewish law) when all parties have accepted its jurisdiction. See e.g., *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007) (business partnership); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005) (bylaws of Jewish congregation); *Avitzur v. Avitzur*, 108 N.E.2d 136 (N.Y. 1983) (prenuptial agreement). See generally, Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review and Due Process*, 107 COLUM. L. REV. 169 (2007); Ginnie Fried, *The Collision of Church and State: Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).

To promote confidence in the international arbitral process, party input into the selection of arbitrators has long been common practice. Even limited interview of candidates by counsel has been allowed, at least with safeguards to avoid discussion of the merits of the case. Rightly or wrongly, litigants often perceive a benefit in direct selection of a tribunal, rather than leaving the choice entirely to an institution. By vetting a proposed arbitrator, the party may feel more comfortable that the case will be decided by someone who is skilled, fair, and perhaps even smart.

Those unfamiliar with international arbitration sometimes express surprise at the degree of party involvement in the selection process, suggesting that it may inject a corrupting influence on the independence of arbitrators. Yet the justification for a heightened party participation will be evident after a moment of mature reflection on the difference between national and international proceedings.

In a relatively homogeneous and integrated juridical environment, the individuals selected as judges (or at an earlier stage, the principal candidates for judgeships) will be well known to the other members of the legal profession (as in England and the United States), or will have been selected by nationally administered examination, as in countries following the French model. They will likely know each other, directly or indirectly, through university, court appearances, or professional associations. Shifting from selection of judges to choice of arbitrators, within a single-country framework, a national institution may well inspire some measure of analogous confidence as an appointing authority, as for example the American Arbitration Association generally commands in the United States.

By contrast, if an American company has a dispute with the Chinese government, the two sides may not be equally comfortable with any single appointing authority framework. The party from the United States may like the American Arbitration Association, while the Chinese may favor the China International Economic and Trade Arbitration Commission (CIETAC). Even venerable institutions of long standing, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), may be suspect to some observers as dominated by interests and traditions of industrialized nations.

In such circumstances, the task of constructing a mutually acceptable arbitral tribunal would normally be facilitated by allowing each side to appoint an arbitrator, and having the two party-nominated arbitrators choose the third member of the tribunal. Such party participation democratizes the process, serving to foster trust that at least one person on the tribunal (the party's nominee) will monitor the procedural integrity of the arbitration.

Party participation in the constitution of a tribunal means that each side will want to be sure that its nominee (and the presiding arbitrator if possible) will be free of doctrinal predispositions that would adversely affect its case. A company whose assets have just been expropriated will not be keen on a tribunal dominated by a professor who has written a book supporting uncompensated nationalization. Likewise, the host state will not want someone who has taken the position that national welfare must take a back seat to profit maximization for the foreign investor.

In practice, the process of evaluating ideological conflicts may shift from avoiding the “wrong”

arbitrator to jockeying for the “best” arbitrator. Even if a litigant knows that an arbitrator cannot be in its pocket, the litigant may, understandably, still hope to appoint someone who falls into its corner doctrinally.³⁴ Thus, rejection of the left-wing professor as tribunal chairman may become an effort to nominate a strong capitalist, with traditional views on “prompt, adequate and effective” compensation. The risk in such excessive wrangling, of course, is that the selection process becomes unworkable, a bit like what happens when a schoolchild tries to sharpen a pencil to an excessively fine point.

The game can become even more complex with respect to procedural matters. For instance, a party hoping to avoid extensive document production may prefer a French professor over an American litigator, given that US style “discovery” (including requests to produce extensive documentation that may be adverse to one’s own arguments) has traditionally been foreign to the Continental legal system.

Party input into the arbitrator selection process need not impinge on arbitrator integrity. Current arbitration rules and canons of ethics point to a consensus that now presumes independence and impartiality as the norm for all arbitrators (not just the chair) on a three-member tribunal, notwithstanding an assumption that each side will nominate an arbitrator.

This is not to deny, however, a tension between the value of independence and the parties’ desire for an advocate on the tribunal. In the United States until recently, party-appointed arbitrators were presumed *not* to be neutral, on the assumption that this was what the business community expected.³⁵ Moreover, skepticism about the merits of neutrality for party-appointed arbitrators has made a revival in some scholarly writing,³⁶ as well as in the emerging protocols for arbitration pursuant to income tax treaties.³⁷

E. Issue Conflict and Role Confusion

³⁴ The late Sir Michael Kerr, a leading light of the English bar during the latter half of the twentieth century, once playfully recounted to the author advice he had received from a senior colleague who learned of his nomination as a party-appointed arbitrator. “My boy,” said the older man, “steer a middle course between too much and too little independence.”

³⁵ See AAA/ABA Code of Ethics, *supra*, preamble. The original Code assumed that the business community expected non-neutrality. However, the modern rules of the major institutional ADR providers require neutrality for party-appointed arbitrators” (citations omitted)).

³⁶ See Tony Cole, *Authority and Contemporary International Arbitration*, 70 LA. L. REV. 801-9 (2010), arguing that party-appointed arbitrators should “see themselves as the party’s representative on the panel.” Prof. Cole suggests that such partisan behavior will enhance understanding of the nominating party’s views, but will not prevent the arbitrator from being independent and impartial. *Ibid.*

³⁷ See, e.g., Model Tax Convention on Income and Capital, Art. 25(5) (OECD, 2008).

Among the new categories for possible conflicts that continue to suggest themselves, increasing concern has been expressed with respect to “issue conflict” and its sibling, “role confusion.” Each represents a special form of prejudgment.

On occasion, an arbitrator must address, in the context of an arbitration, the very same issue presented to him or his law firm as advocate in another case, or to himself as scholar in academic writings. It is not difficult to see why such situations might compromise the integrity of the arbitral process. The arbitrator might be tempted, even subconsciously, to add a sentence to an award that could later be cited in another case. Such an *arrière pensée* might lead to disparaging or approving some legal authority or argument regularly presented in similar disputes, and thus intended to persuade in a different matter where the arbitrator’s firm acts as counsel.

The flip-side of the coin might also present itself, with an arbitrator influenced by his or her position while acting as counsel in another case. This difficulty was encountered in a treaty-based investment proceeding heard in the Netherlands, where a Dutch court gave an individual 10 days to decide whether to resign as arbitrator or as counsel.³⁸ The judicial reasoning rested on the specific facts of the case at bar, and created no automatic presumption of bias simply because the same individual might serve as arbitrator in one case and counsel in another.

Other wrinkles on this theme come from the world of sports. In one recent case, the cyclist Floyd Landis challenged an arbitral award upholding a doping disqualification for use of synthetic testosterone in the 2006 Tour de France. The Lausanne-based Court of Arbitration for Sport/Tribunal Arbitral du Sport (CAS/TAS) had convened the arbitral tribunal to review a ban imposed by the US Anti-Doping Agency.

In September 2008, Landis moved to challenge the decision in a US federal court in California, contending that the arbitral tribunal had been tainted by conflicts of interest.³⁹ The gist of the argument seems to be that the arbitrators came from a limited pool that often filled rotating functions between arbitrator and advocate, allegedly prone to rule favorably for each other.⁴⁰ The independence of the CAS/TAS itself has not always been free from doubt. In its early days, the CAS/TAS was challenged following a 1992 incident implicating a German equestrian whose

³⁸ See A. Marriott, *The Arbitrator is Counsel*, 5 TRANSNAT’L DISP. MGMT (December 2006), available at www.transnational-dispute-management.com.

³⁹ Mr. Landis filed a Motion to Vacate Arbitration Award in the US District Court for the Central District of California. The case was ultimately settled with prejudice on 4 December 2008. Landis moved to vacate on the basis of the Federal Arbitration Act, s. 10(a)(2) (evidential partiality or corruption) and New York Convention, Art. V(1)(a) (invalid arbitration agreement), (d) (improper composition of the tribunal) and (2)(b) (violation of public policy). Motion to Vacate Arbitration Award and Demand for Jury Trial, *Landis v. US Anti-Doping Agency*, No. CV 08-06330 (C.D. Cal. 25 September 2008).

⁴⁰ The motion alleges, “these arbitrators constantly find themselves changing hats, arbitrator one day, litigant the next.” *Ibid.* 27.

horse had ingested a prohibited substance. A challenge to the ban was brought before Switzerland's highest court, the Tribunal fédéral in Lausanne, which was asked to determine whether the decision was in fact an arbitral award in the sense of the Swiss federal and cantonal statutory legal framework for arbitration.⁴¹ Although not denying the validity of the decision in the instant case, the Tribunal fédéral drew attention to the numerous then-existing links between the CAS/TAS and the International Olympic Committee (IOC), which could cause apprehension that the independence of the CAS/TAS would be weakened in the event the IOC stood before it as a party to proceedings.⁴²

In response to the hesitation expressed in this decision, a new supervisory body was created to insulate the CAS/TAS from the influence of the IOC. This new structure seems to have passed muster, at least in the eyes of the Tribunal fédéral.⁴³

IV. Systemic Problems

A. Institutional Bias

To some extent, concerns over issue conflict and role confusion intersect with what is sometimes called “institutional bias.”⁴⁴ A particular arbitral institution might be perceived as tending to appoint arbitrators likely to favor one category of litigants over others. For example, in a consumer debt action, arbitrators with long affiliations to banks and lending institutions might not inspire confidence in borrowers. Or, in a dispute over mismanagement of an investment account, an arbitrator who worked for a large financial institution might create an understandable apprehension of being predisposed to favor the brokerage house.

A somewhat related charge is made that arbitrators may have incentives to decide in favor of claimants in order to increase their prospects of reappointment. For example, one author suggests that “as merchants of adjudicative services, arbitrators have a financial stake in

⁴¹ Elmar Gundel v. Fédération internationale d'équitation, Recueil Officiel Tribunal fédéral Suisse, 15 March 1993, 119 Recueil Officiel des Arrêts du Tribunal fédéral [ATF] II 271 (Switz.), extract reprinted in (1986–1998) Recueil des sentences du TAS Digest of CAS Awards 561 (Matthieu Reeb (ed.), 1998); see Jan Paulsson, *The Swiss Federal Tribunal Recognises the Finality of Arbitral Awards relating to Sports Disciplinary Sanctions Rendered by the IOC's Court of Arbitration for Sports*, INT'L ARB. REP. (October 1993), p. 12.

⁴² One scholar described this decision as “oui, mais” (“yes, but”). Antonio Rigozzi, *L'arbitrage international en matière de sport*, *supra*.

⁴³ See e.g., Lazutina and Danilova v. IOC, FIS and CAS, Tribunal fédéral Suisse, 27 May 2003, 129 ATF III 445 (Switz.) (concerning members of the Russian women's ski team). See also, commentary in Rigozzi, *supra*.

⁴⁴ The most recent survey of the problem can be found in Stavros Brekoulakis, *Systematic Bias and the Institution of International Arbitration*, 4 J. INT'L DISP. SETTLEMENT (Forthcoming 2013).

furthering [arbitration's] appeal to claimants," which results in an "apprehension of bias in favor of allowing claims and awarding damages against governments."⁴⁵

Of course, individuals who supplement their incomes as arbitrators are not immune from temptations to greed and bias to which humanity has always been heir. Each arbitrator should be conscious of the risk that he or she may fall prey to astigmatic perspectives. The beginning of wisdom often lies in a healthy fear of latent bias.

Nevertheless, no evidence supports the proposition that the arbitral system as it now exists provides incentives to produce inaccurate decisions that favor either claimants or respondents, or even that such incentives actually exist. Common sense tells us that the big losers would be none other than professional arbitrators themselves if the process did not inspire general confidence. Although concern may be justified against certain types of arbitration, broad theories of "arbitrator incentives" remain difficult to support in logic or in practice, particularly for cross-border transactions where the principal motivation to arbitrate lies in apprehension about potential anti-foreign prejudice in national courts.

Where necessary, dispute resolution systems can implement mechanisms to promote the balanced composition of a tribunal. For example, US securities arbitration has understandably been concerned that the majority of a three-member tribunal should not be drawn from the ranks of lawyers who make their living representing financial advisers. Consequently, it has long been the practice to identify "public" as opposed to "industry" arbitrators, and to make sure that the latter do not predominate in any arbitral tribunal. Analogous issues arise in employment arbitration, although the ways to assuage the concern are not yet that clearly identified.

B. Repeat Players

Another critique of arbitration arises with respect to so-called "repeat players" who might be appointed several times by the same party or law firm. Although some professional guidelines address the matter,⁴⁶ greater clarity might well be in order.

The notion of "repeat player" has a somewhat chameleon-like character that may lead to confusion. One concern relates to individuals who change functions in the arbitral process, serving one day as advocate and another as arbitrator, thus arguably sitting in judgment of each

⁴⁵ Gus Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007), pp. 152–153. Van Harten then goes on to state his view that arbitrators do not satisfy the requisite standard of "independence."

⁴⁶ The IBA Guidelines include the "Orange List" of situations that may, depending on the facts of the case, give rise to "justifiable doubts" about an arbitrator's independence or impartiality. IBA Guidelines, *supra* at Pt. II, s. 3.13. That provision describes an arbitrator who "has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties." *Ibid.*

other's clients. Another relates to individuals appointed on several occasions by the same company or industry group. For example, in disputes between insurance companies and policyholders, a barrister with a long history of acting on behalf of insurers might regularly be named by insurers. These special situations remain quite distinct from the understandable practice by which experienced individuals serve regularly in commercial and investment disputes, sometimes nominated by claimant, sometimes by respondent, and sometimes as chair.

Much can be said on behalf of the "professional arbitrator" who serves repeatedly, albeit in different types of cases. There may be some truth to the oft-repeated assertion that arbitrators want to see cases decided in favor of the parties which appointed them.

Usually, however, an even stronger incentive exists to safeguard professional status, particularly with peers. Individuals who serve as arbitrators care deeply about the respect of their colleagues, for reasons both personal and professional. Doing a good job builds a positive reputation. Few enticements to good behavior are stronger for those who sit regularly as arbitrators than a colleague's appreciation of one's ability and integrity.⁴⁷

Most criticism of those who form part of the community of arbitration "insiders" seems to be based on speculation and ideological predisposition. The few studies based on hard empirical data tend to confirm that oft-appointed individuals (the so-called "elite" arbitrators) avoid both undue compromise and partisanship.⁴⁸

C. Duty to Investigate

Among the new frontiers being addressed by judicial decisions, few are more intellectually challenging than the matter of an arbitrator's duty to investigate. It has long been common coin of conflicts analysis that arbitrators must disclose significant relationships that might call into question their independence. What happens, however, when the arbitrator knows of no relevant relationships? Must he or she go one step further and investigate possible conflicts? Must arbitrators actively look for trouble?

The answer, perhaps unsatisfying to those who seek hard and fast rules, must be "sometimes." In a recent US case, an appellate court stopped short of imposing a general duty to investigate, limiting its holding to situations in which the arbitrator had reason to believe that some conflict

⁴⁷ For a general study of professional and ethical considerations in arbitrator selection, see The Debate: Unilateral Party Appointment of Arbitrators, ABA Section of International Law, International Arbitration Committee, at 2 (Volume 1, Issue 1 2013).

⁴⁸ See Daphna Kapeliuk, *The Repeat Appointment Factor*, 96 CORNELL L. REV. 47 (2010); Daphna Kapeliuk, *Collegial Games*, 31(2) REV. OF LITIG. 1 (2012).

might exist.⁴⁹ The case confirmed vacatur of a commercial award for “evident partiality” (the relevant standard under the Federal Arbitration Act) because the challenged arbitrator had failed to investigate possible business transactions that might have affected his independence.

The facts of the case merit close scrutiny. A dispute between a Turkish company and an American corporation led to arbitration in which the presiding arbitrator learned of a potential conflict that was disclosed by email, with no objection by either side. After the arbitral tribunal determined liability in favor of the American party, the proceedings continued into the damages phase. It was then discovered that the challenged arbitrator’s company had been involved in a relatively small transaction (approximately US\$275,000) with the entity that acquired the American party. On the arbitrator’s refusal to recuse himself, the Turkish side brought an action to vacate the award on liability. The tribunal chairman was president and CEO of what the reviewing court described as “a multi-billion dollar company with 50 offices in 30 countries.” An affiliate of that group apparently had a relatively small business transaction with a company related to the American side. The chairman had earlier informed the parties of the negotiations with that entity, but did not reveal that at a later time a contract had been actually concluded. The court was not impressed by the arbitrator’s explanation that a “Chinese Wall” had been erected between himself and the potential conflict.

The appellate decision noted that the lower court had cited both the American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA Code of Ethics) and the IBA Guidelines. To the thoughtful observer, this provides an illustration of the trend towards cross-pollination of ethical standards in international arbitration, with national courts looking to professional guidelines just as arbitral institutions look to judicial decisions.

Analogies are not perfect, of course, which is why they are simply analogies. Judges might look to professional guidelines as a way to measure arbitrators with their own ruler. And arbitral institutions might look to judicially created rules as benchmarks that will be applied by reviewing courts. In either instance, however, the result will be a convergence of standards.

Some suggest that counsel, as well as arbitrators, have a duty to investigate. One recent case addressed a situation in which an arbitrator’s web site had listed a relationship with a partner of the respondent’s law firm. Failure to disclose in the context of the arbitration itself led to award vacatur. According to the court, “A party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is obligated to disclose.”⁵⁰

⁴⁹ See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, AS*, 492 F.3d 132 (2d Cir. 2007).

⁵⁰ See *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (California Court of Appeals, 24 September 2013), --- Cal.Rptr.3d ---, 2013 WL 5321158 Cal.App. 2 Dist., 2013. The court continued, “Instead, the obligation rests on the arbitrator to timely make the required disclosure.” Slip opinion at 8.

V. Transnational Standards and “Soft Law”

Increasingly, conflicts of interest implicate non-governmental instruments such as the professional standards issued by the International Bar Association or the American Arbitration Association. To some extent such guidelines will be supplemented by the writings of scholars and practitioners setting forth what might be termed the “lore” of international arbitral procedure.⁵¹

The use of the term “soft law” to designate such guidelines has led to unfortunate misinterpretation and misapprehension. Some observers express concern that non-governmental instruments will undermine the reasonable measure of certainty sought by merchants and investors to guide decision-making. The right critique has been aimed at the wrong target. When properly applied, such standards can enhance certainty by providing an alternative to ad hoc rule-making by jurists whose facile eloquence may articulate “general legal principles” that constitute little more than a figleaf covering personal preferences. If crafted with intelligence, professional guidelines present a better guess about the parties’ shared *ex ante* expectations than the unbridled discretion of overly clever arbitrators who pursue their own agendas.

Soft law instruments thus represent one check on the imperial decision-maker, and perhaps the only standard that can permit elaboration of procedural law through what John Rawls called the “veil of ignorance” about the contingencies of a rule’s application.⁵² Arbitrators who interpret preexisting norms have less leeway to pick rules that will lead to the outcome favoured by their subjective predispositions.

Ethical soft law forms part of a more general phenomenon by which standards elaborated by professional associations serve to guide arbitral decision-making in matters related to evidence and case management. Built on arbitral lore memorialized in articles, treatises and learned papers, these guidelines represent what might be called the “soft law” of arbitral procedure, in distinction to the firmer norms imposed by statutes and treaties. Nothing prevents parties from agreeing to override the guidelines, which enter the arbitration only when such agreement proves impossible.

A. Professional Guidelines

Among the many professional guidelines on arbitrator comportment, two of the most influential

⁵¹ Recent additions to the family of international soft law now include IBA Guidelines on Party Representation in International Arbitration, adopted in May 2013 pursuant to several years of study by a working group chaired by Julie Bédard.

⁵² See John Rawls, A THEORY OF JUSTICE (1971), para. 24, p. 136.

include the IBA Guidelines⁵³ and the Code of Ethics issued jointly by the American Arbitration Association and the American Bar Association.⁵⁴ Whatever one's views about the wisdom of particular rules, most informed observers recognize the rules' far-reaching effects, the latter principally for domestic arbitration conducted within the United States and the former with respect to most international commercial arbitral proceedings. For want of anything better, they get pressed into service to fill the gaps left by overly vague institutional rules or lack of foresight by the parties' advisers.

(i) International Bar Association Guidelines

Perhaps the most oft-cited of these standards can be found in the IBA Guidelines.⁵⁵ Rightly or wrongly, this list has entered the canon of sacred documents cited when an arbitrator's independence is contested. The general standards are both objective and subjective, requiring arbitrators to decline appointment if they have doubts about their ability to be impartial or independent, or if justifiable doubts exist from the perspective of a reasonable third person.⁵⁶

In practice, the dominant test as elaborated in judicial and institutional decisions will be an objective one. Inevitably, challenges by parties will focus on arbitrators who have already discounted any self-doubts they might have. Arbitrators who consider themselves incapable of performing their duties with integrity will normally decline appointment or resign. It would be odd to hear an arbitrator say, "Please note that I'm probably biased. But let me know if you think otherwise." By contrast, the IBA Guidelines set forth a more subjective standard for disclosure, requiring communication of facts or circumstances that may "in the eyes of the parties" give rise to doubts about impartiality or independence.⁵⁷

A disclosure does not necessarily mean disqualification. Evaluation of the potential conflict might be made by the parties as well as whatever institutional body (for example, AAA, ICC or LCIA) hears a challenge prior to court action.⁵⁸ In such instances, the relevant test will normally be something along the lines of justifiable doubts in the mind of a reasonable person, even if articulated with slight differences in the formulations of the institution or national case law.

⁵³ IBA Guidelines, *supra* at General Standard 2.

⁵⁴ The 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes represents a modification of an earlier code adopted in 1977.

⁵⁵ The IBA Guidelines on Conflicts of Interest should not be confused with the less controversial IBA Rules of Ethics for International Arbitrators. The latter include broad, and somewhat bland, admonitions about being competent, diligent, efficient and remaining "free from bias." *See* IBA Rules of Ethics for International Arbitrators (1987), rules 1, 2.

⁵⁶ IBA Guidelines, General Standards 2(a) and 2(b).

⁵⁷ *Ibid.* General Standard 3(1).

⁵⁸ *See e.g.*, AT&T Corp. v. Saudi Cable Co., *supra*, for an ICC challenge preceding an English court challenge.

Excessive disclosure can cause as many problems as inadequate disclosure. If an overscrupulous conscience announces links that would not normally raise questions, this might cause parties to wonder whether there is more going on than meets the eye.

One of the most useful (albeit controversial) features of the IBA Guidelines lies in its enumeration of illustrative elements that create varied levels of arbitrator disclosure. A “Red List” describes situations that give rise to justifiable doubts about an arbitrator’s impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An “Orange List” covers scenarios (such as past service as counsel for a party) that the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a “Green List” enumerates cases (such as membership in the same professional organization) that require no disclosure.

(ii) *The Internationalization of American Rules*

Although one frequently hears about the “Americanization” of arbitration,⁵⁹ connoting aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pretrial discovery, and disruptive objections to evidence, one also notes the internationalization of US dispute resolution practices, as reflected in greater use of written testimony and reasoned awards.⁶⁰

Perhaps the most striking example of internationalization finds itself in the evolution of arbitral ethics. Traditionally, US practice presumed party-nominated arbitrators to be partisan, and thus permitted *ex parte* communication with their appointers.⁶¹ Arbitrators nominated by one side were expected to be non-neutral unless explicitly agreed otherwise.⁶²

⁵⁹ See e.g., Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003).

⁶⁰ See Paul D. Friedland and Ank Santens, *The Internationalization of American Arbitration*, News and Notes from Inst. for Transnat’l Arb. (Spring) (2004).

⁶¹ During the proceedings, arbitrators should not engage in *ex parte* communications about the case with counsel. Nevertheless, some institutional rules remain silent on the matter. Notably, the International Chamber of Commerce has shown itself reticent to publish an explicit prohibition. See Yves Derains and Eric A. Schwartz, *A GUIDE TO THE ICC RULES OF ARBITRATION* (2nd edn, 2005) 131–132; see also, W. Laurence Craig, William W. Park and Jan Paulsson, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (3rd edn, 2000), para. 13.07, p. 242 (seeming to acknowledge that a practice of *ex parte* communication might be agreed by the parties).

⁶² See Code of Ethics for Arbitrators in Commercial Disputes (1977), Canon VII. For a critique of the practice, see Seth H. Lieberman, *Something’s Rotten in the State of Party-Appointed Arbitration: Healing ADR’s Black Eye that is Nonneutral Neutrals*, 5 CARDOZO J. CONFLICT RESOL. 215 (2004).

Most arbitration conducted within the United States was brought into line with global standards requiring independence for all arbitrators. Under the 2004 joint AAA/ABA Code of Ethics, a party-nominated arbitrator may be non-neutral only if so provided by the parties' agreement, the arbitration rules or applicable law.⁶³ The new attitude expressed in the Code was reinforced by changes in the American Arbitration Association's domestic commercial arbitration rules, effective July 2003, establishing a presumption of neutrality for all arbitrators.⁶⁴ These rules coexist along with idiosyncrasies of practice among particular institutions and states.⁶⁵

B. Synthesising Legal Norms

Decisions of national courts, arbitral institutions and arbitrators (in the case of ICSID proceedings) all contribute to the elaboration of what might be called a jurisprudence of ethical standards. Those who must rule on disqualification motions will inevitably seek some understanding of what others have done in analogous cases. Although the decisions do not constitute binding precedent in the sense of many national legal systems, they do provide an indication of what others consider the right approach, and as such contribute to transnational ethical norms.

Admittedly, the practice of looking to different sources of authority will not be satisfying to those who seek a hierarchy of clear authority within a single legal jurisdiction. For better or for worse, however, no such unified judicial system governs the world of international economic relations.⁶⁶ In the world as we find it, an approach taking into consideration relevant national and administrative practice will likely provide greater predictability and fairness than allowing each challenge decision to be fashioned from whole cloth.

Grounds for challenge often present themselves with slight but relevant factual variations. For example, conflicts decisions commonly address an arbitrator's relationship with an institution or company that, in turn, has links to one of the parties in the case.⁶⁷ The potential for taint will

⁶³ See AAA/ABA Code of Ethics, *supra* at preamble to Canon X; *see generally*, "Report to ABA House of Delegates" in (2003/2004) *Int'l Arb. News* (Winter) 15.

⁶⁴ AAA Commercial Arbitration Rules and Mediation Procedures (2007), rule 18.

⁶⁵ See *e.g.*, *Crédit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005) (involving the controversial California Ethical Standards for Neutral Arbitrators). In the case at bar, arising under the rules of the National Association of Securities Dealers, the California standards were found to be pre-empted by the 1934 Securities Exchange Act. *Ibid.* 1121.

⁶⁶ The closest approximation to a supreme court for international law might be found in the International Court of Justice (ICJ), a body with power to decide cases only when states accept jurisdiction through treaty or declaration.

⁶⁷ In this respect, several challenges have been rejected with respect to an arbitrator's membership on the board of a Swiss bank that managed pension funds and whose portfolio

depend on the specific nature and intensity of the relationship, whether as director, owner, counsel or customer.⁶⁸

In an effort to guide both arbitrators and litigants, at least one arbitral institution has published sanitized versions of its challenge decisions. A compendium of challenges under the rules of the LCIA groups the various grounds for disqualification, including the two general rubrics of impartiality or independence, as well as the British formulation of a “duty to act fairly between the parties.”

VI. Three Recurring Problems

A. Trivial and “De Minimis” Contacts

On a planet where butterflies flap wings in Africa so as to cause Canadian snowstorms, clever minds can present scenarios under which most individuals might be deemed less than virgin in attitude or predisposition. Experiences or relationships might create distant but nevertheless worrisome relationships with litigants. Some chance statement by the arbitrator might raise the prospect of troubling predilections about controverted issues in the arbitration.

If a dispute resolution system aims to be useful in a professionally and economically interdependent world, some principles of proportionality and reasonable nexus must operate to triage between genuine and spurious challenges.⁶⁹ Analysis does not end with the discovery of some remote link between arbitrator and dispute. If assessments of arbitrator challenges were

contained shares of one of the parties. *See* Suez v. Argentina, ICSID Case No. ARB/03/17 (claimant Suez, Aguas de Barcelona and InterAguas Servicios); Suez v. Argentina, ICSID Case No. ARB/03/19 (claimant Suez, Vivendi and Aguas de Barcelona); Electricidad Argentina SA v. Argentina, ICSID Case No. ARB/03/22 (claimant Electricidad Argentina and EDFI); EDF International SA v. Argentina, ICSID Case No. ARB/03/23 (claimant EDF International SA, SAUR International SA and León Participaciones Argentinas SA).

⁶⁸ In a dispute implicating a manufacturer of household appliances, an arbitrator who owns a dishwasher made by the manufacturer would present a very different position from that of an arbitrator who served as corporate secretary. An arbitrator who serves on the board of a company with 100,000 customers (one of whom has a link with an affiliate of the respondent) would pose different concerns from those obtaining if the respondent’s affiliate was the principal customer.

⁶⁹ In this connection, one remembers the delightful tirade in Molière’s *Don Juan* when the valet Sganarelle proves the inevitability of his master’s damnation by invoking a series of causal links, each plausible on its own, but together reaching a conclusion in no way justified by the reasoning. The bird clinging to a branch reminded Sganarelle of the duty to cling to moral precepts, and then led him through sky, sea, ships, earth and beasts to the conclusion that his miscreant philandering boss was lost forever, which in any event was the place that the scandalized wanted to reach from the beginning. Molière, *Don Juan*, Act 5, sc. 2.

entirely subjective, ethical standards would become irrelevant to any useful ethical canons. Notions of *de minimis* contacts, related to the proximity or intensity of the troublesome relationship, have been called into service to evaluate an arbitrator's allegedly disqualifying links with one side.⁷⁰ In this connection, the IBA Guidelines attempt to provide concrete criteria for judging arbitrator relationships and predispositions. General Standard 2 of the Guidelines obliges arbitrators to resign if they know of facts or circumstances which, from a reasonable person's point of view, give rise to "justifiable doubts" about the arbitrators' impartiality or independence. In defining justifiable doubts, Standard 2(d) speaks of a "significant" economic or personal interest, not "any" interest.

Looking to national law for analogies, a *de minimis* standard can also be found in Canon 2 of the American Bar Association 2007 Model Code of Judicial Conduct, which requires a judge to perform the duties of judicial office impartially, competently and diligently. Following this general Canon, the ABA Model Code provides as follows:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: ...

(2) The judge knows that the judge ... has more than a *de minimis* interest that could be substantially affected by the proceeding.⁷¹

The ABA Model Code of Judicial Conduct defines *de minimis* to mean "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." It also defines "economic interest" to mean ownership "of more than a *de minimis* legal or equitable interest." In applying this principle, the ABA Model Code of Judicial Conduct states that an economic interest does not include an interest in "a mutual or common investment fund."

Other jurisdictions with developed arbitration laws take a similar perspective. In *ATT v. Saudi Cable Co.*, the English Court of Appeal had to consider the effect of an arbitrator's ownership of shares in a telecommunications company in competition with one of the parties. Any benefit from the arbitration's outcome that could indirectly accrue to the company whose shares were owned by the arbitrator was deemed "of such minimal benefit to [the arbitrator]" that the court held it unreasonable to conclude that the arbitrator's share ownership would be a relevant influence.⁷² An insignificant ownership interest in a company will not be cause for disqualification.

The costs of an absolutist perspective will often outweigh any advantages. If ethical standards did not include some notion of triviality, it would be unduly easy to derail arbitration by asserting a tenuous connection between arbitrators and facts that might arguably have an effect

⁷⁰ See the concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), where Justice White considered it enough that the challenged arbitrator had done "more than trivial business" with one of the parties. *Ibid.* 152 (White J, concurring).

⁷¹ ABA Model Code of Judicial Conduct (2007), rule 2.11.

⁷² *AT&T Corp. v. Saudi Cable Co.*, *supra*.

on their decisions. A “no-link-too-small” theory would permit removal of arbitrators simply because they occasionally socialized with colleagues from the host state. The damage to the stability and efficiency of the arbitral process would affect all those who depend on it to provide relatively fair and neutral adjudication.

B. Saying Too Much Too Early

Arbitrators may be challenged not just for pecuniary or personal links with one side to the dispute, but also when their conduct creates an objective impression of having prejudged a case. For example, a procedural order might express conclusions about a matter that has not yet been the subject of evidentiary hearings, such as reference to ownership of contested property. Whether or not such expressions of opinion taint the arbitrator depends very much on the facts and circumstances of each case. The context of the order might make clear that ownership was presumed merely for the sake of determining whether to grant interim relief to prevent assets from being diverted. The offending language might be tentative and *prima facie* with no intention of depriving either side of a full and fair hearing on the matter, and inserted in an order with qualifying language such as “if so decided by the Tribunal” or “on the assumption that Claimant is ultimately found to be the owner.”

Prejudgment causes problems under both the statutory provisions of developed legal systems and the rules of most arbitral institutions. The interaction of these rules might be illustrated by a hypothetical arbitration in London. The English Arbitration Act 1996 establishes mandatory norms that an arbitral tribunal shall “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.”⁷³ A rich English case law on “apparent bias” makes clear that justice must not only be done, but must be seen to be done. Among the tests proposed by judicial and scholarly pronouncements, one that commends itself looks to see whether the circumstances of the case would lead a fair-minded and informed observer to conclude that there was a real danger that the tribunal was biased.

Institutional rules often applied in London follow similar lines. The LCIA Rules provide that an arbitrator may be considered unfit if he or she “does not act fairly and impartially as between the parties,”⁷⁴ and that an arbitrator may be challenged if “circumstances exist that give rise to justifiable doubts as to his impartiality or independence.”⁷⁵ Bias under that text includes prejudgment of an issue, in the sense of deciding without giving each side an opportunity to present its case.

Sometimes it is said that a party-nominated arbitrator should possess maximum predisposition and minimum bias. Although the value of this unduly cute saying remains doubtful, it is true that for international arbitration, the party-nominee often plays a special role in assisting the presiding

⁷³ Arbitration Act 1996, s. 33(1) (Eng.).

⁷⁴ LCIA Arbitration Rules, art. 10.2.

⁷⁵ *Ibid.* art. 10.3.

arbitrator to understand arguments that may otherwise be less accessible, due to differences in legal culture.

C. Barristers

(i) *Shared chambers*

To the extent London remains one of the great centers for private dispute resolution, the role of British barristers takes on a special significance for international arbitration. In at least one investor–state case, an arbitral tribunal itself held that a barrister should not appear as counsel before another member of his chambers.⁷⁶ Although free to select its lawyers prior to constitution of the arbitral tribunal, the respondent was not entitled to change the composition of its legal team in a way that might imperil the tribunal’s legitimacy.⁷⁷ The tribunal found no absolute bar to barristers from the same chambers being involved as counsel and arbitrator in the same case, but found equally no absolute rule to the opposite effect. Consequently, the justifiability of an apprehension of bias would depend upon “all relevant circumstances.”⁷⁸

Barristers, the arm of the legal profession most often charged with actually arguing cases, traditionally practice from “chambers” that bear both similarities and differences when compared with law firms in general. The chambers include shared office space and administrative assistants styled as clerks, as well as the normal amenities of law practice such as word processors, fax machines and photocopiers. Younger lawyers receive guidance and referrals from more senior members.

Most barristers seem to reject application of the conflict-of-interest rules that would normally be relevant to practice within a law firm. Considering themselves independent and self-employed, sharing expenses but not revenues, barristers see no reason why two members of the same chambers should refrain from acting for opposite sides of an arbitration, or why one should not sit as arbitrator in a case where another serves as advocate.

⁷⁶ *Hrvatska Elektroprivreda, dd v. Slovenia*, ICSID Case No. ARB/05/24 (2008) (implicating claims by a Croatian entity before a tribunal composed of David Williams (Chairman), Jan Paulsson and Charles Brower). It was determined that David Mildon (appointed co-counsel of the respondent) could not participate further in the case because Messrs. Mildon and Williams were both members of Essex Court Chambers.

⁷⁷ Article 56 of the ICSID Convention stresses the stability of properly constituted tribunals, providing that a tribunal’s composition shall remain unchanged except for death, incapacity or resignation. ICSID Convention, Art. 56. The continued appearance of Mr. Mildon might have undermined the legitimacy of the tribunal by giving an appearance of impropriety, or by requiring resignation of Mr. Williams, the tribunal’s Chairman.

⁷⁸ *Hrvatska Elektroprivreda, supra*, Decision on Jurisdiction para. 31. Rumor has it that the problem will be addressed by a proposed code of conduct to be incorporated into the arbitration rules of the London Court of International Arbitration set to go into effect during early 2014.

Not all are convinced, however, that the integrity of proceedings remains uncompromised when barristers from one set of chambers serve as arbitrator and counsel in the same arbitration. Shared profits are not the only type of professional relationships that can create potential conflicts. Senior barristers often have significant influence on the progress of junior colleagues' careers. Moreover, London chambers increasingly brand themselves as specialists in particular fields, with senior "clerks" taking on marketing roles for the chambers, sometimes travelling to stimulate collective business. Moreover, a barrister's success means an enhanced reputation, which in turn reflects on the chambers as a whole.

In response to doubts about the ethics of their practice, some barristers suggest that outsiders just do not understand the system, characterizing the critiques as naïve. Like a Paris waiter impugning a tourist's ability to speak French in order to distract him from insisting on the correct change, the critique aims to camouflage what is at stake. Often, however, outsiders do understand the mechanics of chambers. They simply evaluate the dangers differently.

(ii) International Bar Association Guidelines

The position under English law is what it is. This does not prevent justifiable doubts from arising among parties to international arbitration concerning independence as between two barristers of the same chambers in a single proceeding. Under the IBA Guidelines, the "Orange List" Section 3.3 includes relationships "between an arbitrator and another arbitrator or counsel." As mentioned earlier, this non-exhaustive iteration of various fact patterns covers common scenarios that, depending on the circumstances of each case, might give rise to justifiable doubts as to arbitrator impartiality or independence in the eyes of the parties. The arbitrator thus has a duty to disclose problematic facts, which the parties are deemed to have accepted if no timely objection is made following disclosure.⁷⁹

The Orange List's broad category of "[r]elationship[s] between an arbitrator and another arbitrator or counsel" is amplified by Section 3.3.1, which includes a situation where "the arbitrator and another arbitrator are lawyers in the same law firm." This is supplemented in Section 3.3.3 by a further enumeration of troublesome relationships, to include an arbitrator who was "within the past three years a partner or colleague of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration."⁸⁰

A special provision covers barristers, however. The Orange List, a non-exhaustive enumeration of fact patterns that "may" give rise to justified doubts, includes the following relationship: "The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers." The IBA Guidelines' inclusion of this category was not without debate or objection, and became the subject of a discussion in the "Background" report issued by the IBA

⁷⁹ *Ibid.* General Standard 4(a).

⁸⁰ *Ibid.* Pt. II, s. 3.3.3.

Working Group.⁸¹

(iii) Collegiality and the “outside” arbitrator

When barristers from the same chambers oppose each other as advocates, each wants to show special cleverness. Competitive juices work against inappropriate behavior. Incentives to deviate from duty normally remain outweighed by the goal of proving oneself the better gladiator. Similar considerations reduce risks when one barrister serves as arbitrator while another (from the same chambers) acts as counsel.

Different factors operate, however, when two barristers from the same chambers sit together as arbitrators and exclude meaningful participation by the third member of the tribunal. Their bilateral deliberations remain outside the reach of party scrutiny. The junior of the two barristers might draft the award for the senior to present as “our award” to the third arbitrator, followed perhaps by a perfunctory conference call replacing genuine deliberations.

When a same-chambers relationship is apparent from the start, the litigants will have renounced any objection to composition of the tribunal as such. This does not mean, however, that they waive integrity and good faith in the tribunal’s internal communications, which form an essential part of due process. Parties who stipulate three arbitrators have a right to expect that all will be allowed to participate in discussions.

Exclusion of the third arbitrator derives not from any inherent wickedness in the two affiliated barristers, but from the moral hazard implicit in any hidden in-group complicity and facilitated by the confidential nature of deliberations. Enlightened English arbitrators will remain concerned to avoid the appearance of impropriety in dealings with each other. Nevertheless, when busy barristers have the opportunity to save time by deciding as a two-some, the temptation exists that a “short-on-time” card will be played to justify procedural irregularity, much as a street thief might invoke the “short-on-cash” defense to explain bag snatching.

VII. What is at Stake

In setting standards for arbitrator bias, balance and proportionality matter for the same reason that parties to international contracts choose arbitration in the first place: establishment of a relatively level playing field. As most athletes realize, no pitch will be perfectly even. Each terrain has its own rough spots.

However, some playing fields will be more even than others. The *raison d’être* of arbitrator ethics, like that of arbitration itself, remains to enhance confidence in cross-border economic cooperation by bolstering the reliability of dispute resolution when a deal goes sour. Without binding private dispute resolution, many business transactions would remain

⁸¹ Otto L.O. de Witt Wijnen *et al.*, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L INT’L 433 at pp. 455–456 (2004).

unconsummated from fear of the other side's hometown justice. Or, they would be concluded at higher costs to reflect the greater risk due to the absence of adequate mechanisms to vindicate contract rights or investment expectations.

In consequence, arbitrator integrity takes on significance not only for the direct participants in cross-border trade and investment, but also for the wider global community whose welfare is directly affected by the arbitral process. Even if universally accepted standards of conduct remain elusive, all communities implicated by cross-border arbitration must continue a dialogue on the subject that at the least will help to identify wrong directions and false solutions. Arbitration's broader impact raises propositions of whether an arbitrator's ethical obligations flow to society at large rather than simply to the litigants. The answer, perhaps unsatisfying to ideologues, remains "sometimes."

In any event, the object of the exercise must be an optimum balance between fairness and efficiency, keeping arbitrators free from taint while at the same time reducing the prospect of dilatory tactics aimed at sabotaging proceedings.⁸² If litigants hope to have their disputes resolved by intelligent and experienced individuals, criteria for arbitrator impartiality and independence will need to be implemented with sensitivity to nuanced and complex fact patterns.

⁸² For a recent decision of the U.S. Court of Appeals for the 11th Circuit attempting to reach this balance, see the unanimous *per curiam* opinion in *Federal Deposit Insurance Corporation, as Receiver for Republic Federal Bank N.A. v. IIG Capital LLC* (11th Cir. 7 August 2013) 2013 WL 4007573 rejecting an attack on an award due to contacts between the sole arbitrator and counsel arising from the prominent role of both individuals in the international arbitration community, including teaching at an American University. One jurisprudential idiosyncrasy of this case derives from the fact that for vacatur of awards in international cases, the 11th Circuit has long applied Article V of the New York Convention rather than Section 10 of the Federal Arbitration Act. *See, Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte G.m.b.H.*, 141 F.3d 1434 (11th Cir. 1998); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004).